

DEC 23 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6059

DATE RECEIVED: August 25, 2008

DATE ACTIVATED: October 8, 2008

EXPIRATION OF SOL: August 19, 2013

COMPLAINANTS:

Barbara Mee
Alaskans for Don Young

RESPONDENTS:

Sean Parnell for Congress and Mary Elder
Miller, in her official capacity as treasurer

Club for Growth PAC and Pat Toomey, in
his official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 434(f)
2 U.S.C. § 441a
11 C.F.R. § 100.29
11 C.F.R. § 109.21
11 C.F.R. § 110.2

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

1 **I. INTRODUCTION**

2 The Complaint asserts that a television advertisement by Club for Growth PAC
3 ("CFG PAC"), advocating the Republican nomination of Sean Parnell to run for Alaska's
4 at-large Congressional district, was coordinated with, and thus constituted an excessive
5 in-kind contribution to, Sean Parnell for Congress ("Parnell committee"). See 2 U.S.C. §
6 441a(a)(2); 11 C.F.R. § 110.2(b). Complainants further assert that the advertisement
7 constituted an improper electioneering communication under 11 C.F.R. § 100.29(a).

1 Respondents maintain that the advertisement was not coordinated because CFG
2 PAC's interactions with the Parnell committee did not trigger the conduct prong of the
3 Commission's regulations. *See* 11 C.F.R. § 109.21(d). Further, Respondents maintain
4 that because they limited their discussions to legislative and policy positions, these
5 contacts fall under the regulation's safe harbor provision. *See* 11 C.F.R. § 109.21(f).
6 Finally, CFG PAC contends that the advertisement is not an electioneering
7 communication but rather an independent expenditure that it reported under the Act. *See*
8 2 U.S.C. § 434(f)(3)(B)(ii); 11 C.F.R. § 100.29(c)(3).

9 Because Respondents conclusively refuted the speculative allegation as to
10 coordination of the CFG PAC television advertisement, and because Respondents
11 reported payment for the ad as an independent expenditure, we recommend that the
12 Commission find no reason to believe that Respondents violated any provision of the
13 Federal Election Campaign Act ("the Act").

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 **A. Factual Background**

16 CFG PAC is the separate segregated fund of Club for Growth, a Washington,
17 D.C.-based membership organization that supports an agenda of free markets, low taxes,
18 and limited government. *See* <http://www.clubforgrowth.org>. Commission records reflect
19 that as of November 24, 2008, CFG PAC reported receiving over \$3 million in
20 contributions and making over \$3 million in expenditures for the current election cycle.

21 On August 19, 2008, CFG PAC broadcast a television advertisement in Alaska
22 that advocated the Republican nomination of Sean Parnell to run for Alaska's at-large
23 congressional district and opposed the incumbent, Republican Representative Don

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1 Young. See http://www.youtube.com/watch?v=fjjHZ_B27NU&feature=related. The
2 advertisement criticized Representative Young and then stated: "Governor Sarah Palin
3 supports a change. She backs Sean Parnell for Congress."¹ Commission records reflect
4 that on August 19, 2008, CFG PAC filed a Schedule E (24/48 Hour Notice of
5 Independent/Coordinated Expenditure) to report \$12,142.20 in television advertisement
6 production costs.

7 Complainants Barbara Mee and Alaskans for Don Young allege that the television
8 advertisement is a coordinated communication and therefore qualifies as an excessive in-
9 kind contribution under 11 C.F.R. § 109.21(b). See Complaint. Complainants likewise
10 allege that the advertisement was an improper electioneering communication under 11
11 C.F.R. § 100.29. See *id.*

12 Complainants attach a news article about CFG PAC's endorsement of Parnell, an
13 email from CFG PAC treasurer Pat Toomey to CFG members supporting Parnell's
14 nomination and requesting contributions to his committee, and a press release about the
15 television advertisement and CFG PAC's endorsement. See *id.* Complainants'
16 allegations that Parnell and CFG PAC staff discussed campaign strategy in phone
17 conversations and during a meeting before the date the advertisement aired are supported
18 only by the statement that, "[i]t can be assumed that he has discussed his campaign plans,
19 projects, activities and needs, position on issues, poll results and other information
20 concerning his campaign." *Id.*

21 CFG PAC maintains that the advertisement does not constitute a "coordinated
22 communication" under 11 C.F.R. § 109.21. See Letter from Carol A. Laham, Wiley Rein

¹ This Office has transcribed the advertisement and included it as Attachment I.

1 LLP, to Thomasenia P. Duncan, General Counsel, Federal Election Commission (Sept.
2 15, 2008). Specifically, CFG PAC asserts that because it met with Parnell solely to
3 discuss his views on legislative and policy issues, its actions do not meet the conduct
4 standards under 11 C.F.R. § 109.21(c)(1)-(6), and further, the safe harbor provision of 11
5 C.F.R. § 109.21(f) exempts their discussions. *See id.* Accordingly, CFG PAC maintains
6 that because the advertisement was not coordinated, it does not qualify as an in-kind
7 contribution that would exceed the Act's contribution limits.

8 CFG PAC also responds that the advertisement is not an electioneering
9 communication because it is exempt from the definition under 2 U.S.C. § 434(f)(3)(B)(ii)
10 and 11 C.F.R. § 100.29(c)(3), which relieves federal political committees like CFG PAC
11 from the requirement to file separate electioneering communication reports. *See id.* CFG
12 PAC further reported the advertisement as an independent expenditure in disclosure
13 reports to the Commission. *See* Schedule B (24/48 Hour Notice of
14 Independent/Coordinated Expenditure) *available at* [http://query.nictusa.com/cgi-](http://query.nictusa.com/cgi-bin/dcdev/forms/C00432260/358858/ae)
15 [bin/dcdev/forms/C00432260/358858/ae](http://query.nictusa.com/cgi-bin/dcdev/forms/C00432260/358858/ae).

16 Sean Parnell also submitted a response. *See* Letter from Sean Parnell to General
17 Counsel, Federal Election Commission (Sept. 15, 2008) ("Parnell letter"). Parnell
18 similarly contends that because he discussed only his legislative and policy positions
19 during the meeting and phone conversations with CFG PAC, the allegations meet neither
20 the content nor conduct prongs of the regulations.

21 **B. Analysis**

22 The central issue in this matter is whether CFG PAC's advertisement, which
23 advocated the Republican nomination of Sean Parnell to run for Alaska's at-large

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1 Congressional district, was coordinated with the Parnell committee. A payment for a
2 coordinated communication is an in-kind contribution to the candidate, authorized
3 committee, or political committee with whom or which it is coordinated. *See* 2 U.S.C. §
4 441a(a)(7)(B)(i); 11 C.F.R. § 109.21(b)(1).

5 The Commission's regulations provide a three-prong test to determine whether a
6 communication is coordinated.² All three prongs of the test must be satisfied to support
7 a conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
8 Explanation and Justification for Regulations on Coordinated and Independent
9 Expenditures, 68 Fed. Reg. 772 (Jan. 3, 2003).

10 To satisfy the first prong of the test, someone other than a candidate, an
11 authorized committee, or a political party committee must pay for the communication.
12 *See* 11 C.F.R. § 109.21(a)(1). In the present matter, CPG PAC clearly satisfies the
13 payment prong as indicated by the independent expenditure report it filed with the
14 Commission on August 19, 2008.

15 The second prong evaluates the content of the communication. *See* 11 C.F.R. §
16 109.21(c). The content standard is satisfied, *inter alia*, by a public communication within

² After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). This decision does not affect this matter, however, because the communication at issue meets other parts of the content standard that the appellate court did not criticize or invalidate.

1 90 days or fewer of an election that refers to a clearly identified candidate for federal
2 office.³ See 11 C.F.R. § 109.21(c)(4)(i). Here, the advertisement meets the definition of
3 "public communication" under 11 C.F.R. § 100.26, because it refers to candidate Sean
4 Parnell, and appeared within 90 days of the primary election. CFG PAC's advertisement,
5 in fact, aired August 19, 2008, one week prior to the primary election on August 26,
6 2008. Thus, the content standard is satisfied.⁴

7 The third prong of the coordination test, the conduct standard, requires analysis of
8 affirmative acts taken by the parties who are alleged to have engaged in the coordinated
9 activity. The conduct standard may be satisfied by affirmative acts that fall into any one
10 of six general categories: request or suggestion; material involvement; substantial
11 discussion; common vendor; former employee or independent contractor; and
12 dissemination, distribution, or republication of campaign material. 11 C.F.R. §
13 109.21(d)(1)-(6). However, a safe harbor provision exempts responses to inquiries about
14 legislative or policy issues. See 11 C.F.R. § 109.21(f). As discussed below, the available
15 information does not suggest that Respondents satisfied any of the conduct standards
16 required for there to have been coordination.

17 The complaint in the present matter does not contain specific allegations as to the
18 conduct standards. Rather, it merely claims that, based on press reports that Parnell had

³ Although the Court in *Shays III* narrowed the time frame under 11 C.F.R. § 109.21(c)(4)(i) to 90 days from 120 days before an election, CFG's advertisement fell well within the shorter time frame when it aired one week before the primary election.

⁴ Alternatively, the content prong may be satisfied by a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office. 11 C.F.R. § 109.21(c)(3). In the advertisement, which was reported as an independent expenditure on August 19, 2008, CFG PAC criticizes Don Young's record and labels him "just another Washington politician." The advertisement notes that "Governor Sarah Palin supports a change. She backs Sean Parnell for Congress." See 11 C.F.R. § 100.22(a) and *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (listing "magic words" that indicate "explicit words of advocacy of election or defeat.").

1 net with CFG, "[i]t can be assumed that [Parnell] has discussed his campaign plans,
2 projects, activities and needs, position on issues, poll results and other information
3 concerning his campaign." See Complaint. Under similar circumstances in a previous
4 matter, the Commission found no reason to believe that MoveON.org Voter Fund had
5 coordinated its communications with John Kerry for President, Inc. because there was no
6 specific information that suggested triggering of the conduct standards. See Factual and
7 Legal Analysis in MUR 5754 (MoveON.org Voter Fund) at 3-4. That complaint also
8 merely relied on the inference that the communication had been coordinated due to
9 reported ongoing general discussions between Democratic leaders and MoveON, and
10 because John Kerry and his wife attended a MoveON house party. *Id.* at 3. The
11 complaint in the matter, like MUR 5754, fails to provide "probative information of
12 coordination." See also First General Counsel's Report in MUR 5774 (Lamborn for
13 Congress) and Factual and Legal Analysis in MUR 5750 (Laffey U.S. Senate) at 6
14 (finding no reason to believe that Respondents made prohibited in-kind contributions in
15 the form of coordinated communications because complainant based the allegations on
16 speculative inferences of coordination rather than specific facts).

17 Respondents provided a comprehensive response to the allegations that the
18 advertisement was a coordinated communication. CFG PAC's Executive Director, David
19 Keating, provided an affidavit that discussed each element of the conduct prong and
20 maintained that CFG PAC discussed only Parnell's views on legislative and policy issues
21 during their meetings and telephone conversations. Keating avers that CFG PAC did not
22 air the advertisement at the request or suggestion of the Parnell committee, nor did it seek
23 assent from the committee to run the advertisement. Keating Aff. ¶ 9. 11 C.F.R. §

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1 109.21(d)(1). Keating stated that the Parnell committee was not involved in the
2 development, creation, content, or dissemination of the advertisement. Keating Aff. ¶ 10.
3 11 C.F.R. § 109.21(d)(2). Regarding the discussions between CFG and the Parnell
4 committee, Keating stated that the topics covered only legislative and policy issues.
5 Keating Aff. ¶ 6. Thus, Respondents did not engage in substantial discussion regarding
6 the creation, production, or distribution of the advertisement as outlined in 11 C.F.R. §
7 109.21(d)(3). Keating states that CFG PAC's policy is to employ vendors unrelated to
8 candidates featured or mentioned in their advertisements.⁵ Keating Aff. ¶ 14. 11 C.F.R.
9 § 109.21(d)(4). Similarly, Keating stated that CFG PAC did not employ a former staffer
10 or independent contractor associated with the Parnell committee, the Young committee,
11 or a political party committee. Keating Aff. ¶ 13. 11 C.F.R. § 109.21(d)(5). As to the
12 conduct prong's final affirmative act, Keating stated that CFG PAC did not disseminate,
13 distribute, or republish campaign material. Keating Aff. ¶¶ 9, 10. 11 C.F.R. §
14 109.21(d)(6).

15 Lastly, a safe harbor provision in the regulations exempts candidate responses "to
16 an inquiry about that candidate's . . . positions on legislative or policy issues, but not
17 including a discussion of campaign plans, projects, activities, or needs." 11 C.F.R. §
18 109.21(f). Given that both CFG PAC and Parnell maintain that their meeting and
19 telephone conversations covered only the candidate's legislative and policy positions,

⁵ See also MUR 5823 (Walberg for Congress) (finding no reason to believe that communications were coordinated in a manner that resulted in prohibited and/or excessive in-kind contributions in the form of coordinated communications). In MUR 5823, the complaint alleged that CFG PAC television and radio advertisements were coordinated with a campaign committee through the use of three common vendors. See Factual and Legal Analysis in MUR 5823 at 3-6. Ultimately, the Commission found no reason to believe that the advertisements were coordinated because Respondents provided comprehensive responses to otherwise "speculative allegations of common vendor coordination." *Id.* at 12. But see MUR 5415 (Club for Growth) (finding reason to believe that ads may have been coordinated ads through a common vendor during the 2004 Senate Primary in Pennsylvania).

1 such discussions would seem to fall under the safe harbor. While the affidavit alone
2 would not dispose of the coordination issue if there were contrary evidence or
3 information, the complaint relied on speculative allegations based on media reports about
4 a meeting between Respondents. Furthermore, the Commission has not received any
5 information to dispute Respondents' explanations in the sworn affidavit.

6 As to complainants' allegation that the advertisement constitutes an improper
7 electioneering communication, the expenditure and independent expenditure exemption
8 in 2 U.S.C. § 434(f)(3)(B)(ii) and 11 C.F.R. § 100.29(c)(3) relieves federal political
9 committees like CFG PAC from the requirement that they file separate electioneering
10 communication reports when they disclose the comments as an independent expenditure.
11 The Act and Commission regulations set forth four exceptions to the definition of
12 "electioneering communication." 2 U.S.C. § 434(f)(3)(B); 11 C.F.R. § 100.29(c). One of
13 these statutory exceptions covers communications that are expenditures or independent
14 expenditures under the Act. 2 U.S.C. § 434(f)(3)(B)(ii); 11 C.F.R. § 100.29(c)(3).

15 The Commission determined that communications that would otherwise meet the
16 definition of electioneering communications are, in fact, expenditures when made by a
17 political committee and must be reported as such. *Electioneering Communications; Final*
18 *Rules*, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002); *see also* *Bipartisan Campaign*
19 *Reform Act of 2002; Reporting; Notice of Proposed Rulemaking*, 67 Fed. Reg. 64,555,
20 64,561 (October 21, 2002). In the present matter, CFG PAC submitted a 24-hour notice
21 that reflected \$12,142.20 in independent expenditures on August 19, 2008 for "TV ad
22 production costs." *See* [http://query.nictusa.com/cgi-](http://query.nictusa.com/cgi-bin/dcdev/forms/C00432260/358858/se)
23 [bin/dcdev/forms/C00432260/358858/se](http://query.nictusa.com/cgi-bin/dcdev/forms/C00432260/358858/se).

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C. Conclusion

Based on the above, sufficient information does not exist for the Commission to conclude that the advertisement was coordinated because Respondents' activities do not appear to trigger the conduct prong of the coordinated communication test. Accordingly, the advertisement was not an in-kind contribution. Further, because the advertisement was reported as an independent expenditure, it is not, as Complainants allege, an electioneering communication.

Therefore, we recommend that the Commission find no reason to believe that Club for Growth PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2) by making an in-kind contribution in the form of a coordinated expenditure. Moreover, we recommend that the Commission find no reason to believe that Sean Parnell for Congress and Mary Elder Miller, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting an in-kind contribution. We further recommend that the Commission find no reason to believe that Club for Growth PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. § 434(f) by failing to report an electioneering communication.

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III. RECOMMENDATIONS

1. Find no reason to believe that Club for Growth PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2).
2. Find no reason to believe that Sean Parnell for Congress and Mary Elder Miller, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f).
3. Find no reason to believe that Club for Growth PAC and Pat Toomey, in his official capacity as treasurer violated 2 U.S.C. § 434(f).
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Thomasenia P. Duncan
General Counsel

12/23/08

Date

BY:

Ann Marie Terzaken
Ann Marie Terzaken
Associate General Counsel for Enforcement

Stephen Gura
Stephen Gura
Deputy Associate General Counsel
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Mark Shonkwiler
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Phillip A. Olaya
Attorney

1 Attachments:

2 1. Transcript of television advertisement broadcast on August 14, 2008

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Transcript:

"New Club for Growth PAC Ad in Alaska"

Narrator:

It's sad about Don Young. Don Young pushed a \$10 million spending earmark that would benefit a developer in Florida. And the developer raised \$40,000 for Young. Young broke his tax pledge and voted with the Democrats to raise taxes. Governor Sarah Palin supports a change. She backs Sean Parnell for Congress. Don Young. After 35 years, just another Washington politician.

Club for Growth PAC is responsible for the content of this advertising.

(30 seconds)

http://www.youtube.com/watch?v=fjjHZ_B27NU&feature=related